IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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| GRANARY ASSOCIATES, INC., and GRANARY ASSOCIATES ARCHITECTS, P.C. | : | CIVIL ACTION |
| v. | : | |
| EVANSTON INSURANCE CO. | : | No. 99-5154 |

**MEMORANDUM AND ORDER**

**J. M. KELLY, J.** **JANUARY , 2001**

Presently before the Court is a Motion for Partial Reconsideration filed by the Defendant, Evanston Insurance Company ("EIC"). This suit arises out of the alleged breach of an insurance policy by EIC, the insurer. EIC denied coverage to Plaintiffs, Granary Associates, Inc. ("GAI") and Granary Associates Architects, P.C. ("GAA"), because, in part, EIC thought the insureds' close relation to the injured party had triggered an exclusion in the insurance policy. The Court entered judgment against EIC on that issue on December 4, 2000, and EIC now seeks reconsideration of that judgment. For the following reasons, EIC's motion is denied.

## I. BACKGROUND

West Jersey Health Systems ("WJHS"), a New Jersey company,

wanted to build a new medical facility in Sicklerville, New Jersey. WJHS hired GAI to construct the new facility. In order to allow WJHS to finance the construction project as an "off balance sheet" transaction, which would prevent any debt from appearing on WJHS's books, GAI created two new business entities, WJD, L.L.C. ("WJD") and Aegis Realty Development, Inc. ("Aegis"). After the creation of these new business entities, Aegis acted as the project's developer and WJD functioned, in essence, as its owner.

The operating lease between WJHS and WJD provided that WJHS would select the color of the facility's exterior. WJHS's Director of Design Construction Management, Louis Moffa, decided that the new building should be constructed in white masonry with a pink trim. The Project Architect, however, transposed the colors that WJHS had ordered; he thought WJHS had ordered a pink building with white trim. The Project Architect relayed this mistake to GAI's Project Director, E.J. Hedger. After Hedger placed the mistaken order with the General Contractor, construction of the new facility began.

By the time WJHS noticed the mistake, masons had already erected 20-25% of the walls. WJHS, which did not want to own a pink building, objected. During negotiations among the parties, WJD suggested correcting the mistake by painting the walls white or bleaching the walls to remove the pink color. WJHS rejected

these ideas and insisted that the builders raze the pink walls entirely and erect white masonry walls in their place. Finally, on October 9, 1997, the parties compromised; WJD would pay for the construction of new white walls that would act as a veneer, completely concealing the pink walls. This solution would add an additional $300,000 to the cost of construction, which WJD would bear.

Because WJD bore the additional costs of the facade solution, it demanded that GAI and GAA indemnify it. GAI and GAA then filed an insurance claim with its insurer, EIC. GAI and GAA were covered by an Architect's and Engineer's Professional Liability Insurance Policy ("the Insurance Policy") issued by EIC.

EIC eventually denied coverage of the claim because, in its opinion, the relationship of the injured party, WJHS, to GAI and GAA had triggered Exclusion III of the Insurance Policy. Exclusion III, a "business enterprise exclusion," is triggered when an insured business entity is closely related to an injured party bringing a claim against the insured. Exclusion III states:

> Notwithstanding anything contained in this Policy to the contrary, the coverage herein shall not apply to a Claim made against the Insured: (1) by a person, firm or organization . . . that wholly or partly owns, operates, manages or otherwise controls an insured, whether directly or indirectly, or that is wholly or party owned, operated, managed or otherwise controlled by an

> Insured, whether directly or indirectly; or (b) by a firm or organization . . . of which any principal, partner, director, officer or stockholder of a Named Insured directly or indirectly maintains ownership, or who directly or indirectly operates, manages or otherwise controls such firm or organization . . . .

In this case, Michael Eastwood owned both GAI and WJD, and Salvatore Scelsi acted as the treasurer of GAA and WJD.

GAI and GAA believe that EIC was nonetheless obligated to cover their claim. On October 19, 1999, GAI and GAA filed suit in this Court for breach of the Insurance Policy, and the parties eventually filed cross-motions for Summary Judgment. The Court concluded that summary judgment in EIC's favor was only appropriate if the nature of the insureds' claim triggered the language of the exclusion and presented, at a minimum, a possibility of collusive loss-shifting by the insured. Finding that the express language of the exclusion had been triggered but no threat of collusion existed, the Court entered summary judgment on this issue against EIC on December 4, 2000.[1] EIC then filed its Motion for Reconsideration of that Order, which the Court will now consider.

## II. STANDARD OF REVIEW

Federal Rule of Civil Procedure 59(e) and Local Civil Rule

[1] The Court denied summary judgment on the issue of the consent clause of the Insurance Policy, paragraph V(d).

7.1(g) of the United States District Court for the Eastern District of Pennsylvania allow parties to file motions for amendment or reconsideration of a judgment. Courts should grant these motions sparingly, reserving them for instances when: (1) there has been an intervening change in controlling law; (2) new evidence has become available; or (3) there is a need to prevent manifest injustice or correct a clear error of law or fact. See, e.g., General Instrument Corp. v. Nu-Tek Elecs., 3 F. Supp. 2d 602, 606 (E.D. Pa. 1998), aff'd, 197 F.3d 83 (3d Cir. 1999); Environ Prods., Inc. v. Total Containment, Inc., 951 F. Supp. 57, 62 n.1 (E.D. Pa. 1996). Dissatisfaction with the Court's ruling is not a proper basis for reconsideration. See Burger King Corp. v. New England Hood and Duct Cleaning Co., No. 98-3610, 2000 WL 133756 at *2 (E.D. Pa. Feb. 4, 2000).

## III. DISCUSSION

EIC's Motion to Reconsider points to no changes in controlling law since the Court's Order of December 4, 2000. Nor does it point to any relevant new evidence that has since become available. Accordingly, the success of EIC's motion turns on whether the Court committed clear error or if denying the motion would result in manifest injustice.

EIC's Motion does not seek reconsideration of the Court's interpretation of Niagara Fire Ins. Co. v. Pepicelli, Pepicelli,

Watts & Youngs, P.C., 821 F.2d 216, 220-21 (3d Cir. 1987) and Coregis Ins. Co. v. LaRocca, 80 F. Supp. 2d 452, 456-68 (E.D. Pa. 1999), the leading cases concerning business enterprise exclusions.[2] EIC does suggest, however, that the Court erred in applying those cases to the instant one. Specifically, EIC states that a possibility of collusive loss-shifting does exist on the record.

In its December 4, 2000 Order, however, the Court found otherwise. In order to reconsider that decision, the Court must be presented with new evidence or a showing of clear error. EIC has failed to present either. Although EIC cites evidence that it believes proves that a possibility of collusion existed, EIC already presented these facts in support of its own Motion for Summary Judgment on this issue. This evidence is not new, and as such will not support a motion for reconsideration. See, e.g., Environ Prods., 951 F. Supp. at 62 n.1. Nor have these facts, which the Court already carefully considered, persuaded the Court that its decision was erroneous.

EIC also asks the Court to allow it, at trial, to present other evidence tending to show that a possibility of collusion did in fact exist. The gravamen of this request is that the Court's Order of December 4, 2000 established a new legal

[2] Although EIC submits that the Court did err in interpreting these cases, it has elected not to seek reconsideration of that issue.

standard that did not previously exist; because EIC did not expect to have to prove a possibility of collusion, it believes the Court should allow it to present evidence to that effect now. The Court disagrees. First, this Court's requiring a minimal showing of a possibility of collusion did not create a new or unexpected legal hurdle for EIC. Indeed, EIC's opponents argued that a showing of actual collusion was necessary before EIC could enjoy the protection of the business enterprise exclusion. Given that fact, EIC should have prepared for the possibility that this Court would require a showing that, at a minimum, a threat of collusion should exist before a business enterprise exclusion would become effective.

Moreover, allowing EIC to present evidence at trial on this issue would be tantamount to reversing this Court's entry of judgment against it. A court cannot, however, grant a motion to reconsider on the basis of evidence, new or otherwise,[3] not yet made part of the record. If EIC believes it was denied the opportunity to present evidence of collusion, and that such evidence would have led the Court to a different conclusion, it should have presented that evidence in support of the instant Motion to Reconsider. EIC cannot expect the Court to speculate

[3] Any evidence that EIC wants to present to a trier of fact would most likely not be considered new within the meaning of the Federal or Local Rules of Civil Procedure because EIC had it at the time it briefed the cross-motions for Summary Judgment and has no excuse for its non-production at that time.

about the nature of the evidence that it would present at trial. Accordingly, EIC's Motion to Reconsider the Court's Order of December 4, 2000 is denied.

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**O R D E R**

**AND NOW**, this day of January, 2001, in consideration of the Motion for Reconsideration filed by the Defendant, Evanston Insurance Company, which was erroneously fashioned as Motions for Summary Judgment (Doc. Nos. 23 and 25), and the Response thereto filed by the Plaintiffs, Granary Associates, Inc. and Granary Associates Architects, P.C., it is **ORDERED** that the Motion for Reconsideration is **DENIED**.

BY THE COURT:

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JAMES McGIRR KELLY, J.